

SERVICE DATE – APRIL 8, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY—TERMINAL TRACKAGE RIGHTS—KANSAS CITY
SOUTHERN RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

Decided: April 7, 2015

BACKGROUND

BNSF Railway Company (BNSF) filed an application under 49 U.S.C. § 11102(a) for terminal trackage rights over the Rosebluff Industrial Lead (the RIL), track that is jointly owned by Kansas City Southern Railway Company (KCS) and Union Pacific Railroad Company (UP). The RIL connects to the former Southern Pacific Transportation Company's Lafayette Subdivision that is now jointly and equally owned by BNSF and UP. The RIL connects at milepost 223.3 and extends approximately nine miles to the south.

KCS and UP filed separate replies in opposition to BNSF's application for terminal trackage rights. CITGO Petroleum Corporation (CITGO) filed a petition to intervene in support of BNSF's petition.¹

Following the conclusion of Board-ordered mediation, the Board adopted a procedural schedule by decision served on December 1, 2014. BNSF filed its opening statement on December 31, 2014. However, prior to the deadline for KCS and UP's replies to the opening statement, certain discovery disputes arose among the parties. The Board therefore served a decision on February 25, 2015, holding the procedural schedule, including the deadlines for replies and rebuttal, in abeyance pending the resolution of the discovery disputes and further order of the Board.

More particularly, on January 15, 2015, KCS filed a motion to compel responses to KCS's first set of discovery requests directed to BNSF. BNSF replied to the motion on February 4, 2015. KCS filed a second motion on February 6, 2015, to compel responses to KCS's second set of discovery requests directed to BNSF. On February 9, 2015, KCS filed a motion to compel responses to KCS's first set of discovery requests directed to CITGO. BNSF replied to KCS's motion to compel responses to KCS's second set of discovery requests on February 26, 2015. On March 2, 2015, CITGO filed its reply to KCS's motion to compel. On March 6, 2015, UP filed a letter with the Board regarding these discovery disputes. On

¹ The Board granted CITGO's petition to intervene in a decision served on April 14, 2014.

March 10, CITGO filed a letter responding to the March 6 letter from UP. BNSF filed a letter on March 11, and KCS filed a letter on March 16. CITGO and BNSF filed letters responding to KCS's March 16 letter on March 18 and March 19, respectively.

DISCUSSION

Under 49 U.S.C. § 11102(a), the Board may grant terminal trackage rights if the Board finds that use to be “practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.”

In its motions to compel, KCS has argued that it seeks materials (e.g., traffic tapes, documents, and interrogatory responses) that are relevant to at least two determinations that the Board must make: (1) whether a grant of direct trackage rights to BNSF is in the public interest in order to preserve competition in the region; and (2) whether a grant of direct trackage rights to BNSF would impair KCS's operations. In replying to KCS's motions, BNSF has principally asserted that the requested materials are irrelevant, because the Board has already decided these two issues against KCS in Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. (Decision No. 44), 1 S.T.B. 233 (1996), in which the Board approved the common control and merger of the rail carriers controlled by UP and the rail carriers controlled by Southern Pacific Rail Corporation. BNSF has argued that the Board affirmed this position in Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. (Decision No. 63), FD 32760 (Sub-No. 46) (STB served Dec. 4, 1996). CITGO similarly challenges KCS's contention that the Board must conduct a “public interest” analysis regarding competition in this proceeding.

In its March 6 letter to the Board, UP did not take a position on whether KCS's motions to compel should be granted or denied, but it urged the Board not to resolve the pending discovery disputes in a way that prejudices the merits of the underlying trackage rights dispute.

The Board has signed a Memorandum of Understanding (MOU) with the Federal Energy Regulatory Commission (FERC) to employ the services of FERC administrative law judges (ALJs) on a case-by-case basis to perform discrete, STB-assigned functions such as adjudicating discovery disputes between parties in cases pending before the STB.

The Director of the Office of Proceedings, pursuant to authority delegated by the Chairman under 49 C.F.R. § 1011.6, is assigning and authorizing Administrative Law Judge Steven A. Glazer of FERC to entertain and rule upon discovery matters and to resolve all disputes concerning discovery in this proceeding. The purpose of this referral is not for the ALJ to resolve any underlying disputes regarding the meaning of Decision No. 44, the meaning of Decision No. 63, or the scope of the public interest analysis necessary for a decision on the merits.

The parties in this proceeding are hereby directed to send copies of all their filings and documents in this proceeding to Judge Steven A. Glazer at the Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is assigned to Administrative Law Judge Steven A. Glazer for handling of all discovery matters and initial resolution of all discovery disputes.
2. This decision is effective on its service date.
3. Each party in this proceeding must send a copy of its filings to Judge Steven A. Glazer at the Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426.
4. Judge Steven A. Glazer will be added to the service list in this proceeding, and a copy of this decision will be served upon him.
5. A copy of this decision will be served on the United States Office of Personnel Management (OPM), at Human Resources Solutions, ALJ Program Office, 1900 E Street NW, Room 2458, Washington, DC 20414-9400. Judge Glazer shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.